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**Via Electronic Filing**

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

**Re: Ex Parte 677—Common Carrier Obligation of Railroads**

Dear Secretary Quinlan.

Union Pacific Railroad Company writes in response to Highroad Consulting, Ltd.'s September 17, 2008 letter to the Board, regarding the decision of the 10th Circuit Court of Appeals in *Port City Properties v. Union Pacific*.<sup>1</sup> In its letter, Highroad asks the Board to "express its view with respect to the railroads' obligations to maintain spur track connections as a part of their common carrier service obligations."<sup>2</sup> Highroad does not purport to represent any party in the *Port City* matter and appears to be unaware of the facts underlying the case.

In *Port City*, Hodges, a shipper, charged that UP had wrongly discontinued service over a UP-owned spur that served its facility. The Court concluded that the track in question was an "industrial or spur track," and was therefore not subject to the Board's entry and exit authority. The Court further noted that UP discontinued service over the track due to unsafe conditions.

Additional facts not addressed in the decision were: 1) UP had removed the spur from service for safety reasons following a May 8, 2006 derailment on it, 2) the agreement governing construction and maintenance of the spur provided that Hodges was responsible for paying maintenance costs, 3) Hodges declined to pay for the necessary track restoration following the derailment; and 4) all traffic that had moved over the spur during the time leading up to the derailment was exempt traffic under 49 C.F.R. Section 1039.11.

<sup>1</sup> *Port City Properties v. Union Pacific RR Co.*, 518 F.3d 1186 (10th Cir. 2008).

<sup>2</sup> UP notes that the *Port City* decision was released on March 10, 2008, more than six months before Highroad Consulting filed its letter with the Board. This date was also more than a month before the Board's April 17 comments deadline and April 24 oral hearing in *Ex Parte 677*. Highroad offers no explanation for its delay.

The Court's decision was not only consistent with Board precedent—it was based on it. The Court relied upon the Board's *City of Auburn* decision, holding that Congress intended to leave "the construction and disposition of auxiliary [spur] tracks entirely to railroad management."<sup>3</sup> The Board has reached the same conclusion in numerous subsequent proceedings.<sup>4</sup>

Finally, there is no need for the Board to "express its view" regarding railroads' common carrier obligations with respect to spur tracks, since it has already done so. First, all traffic moving over the Port City spur during the time leading up to its closure was exempt traffic—copper products (STCC 33) and bricks (STCC 32-511)—which railroads have no common carrier obligation to transport.<sup>5</sup> And second, even if the traffic had not been exempt, a railroad's common carrier obligation would not prevent it from discontinuing service on spur tracks.<sup>6</sup> While a shipper has a remedy to avert abandonment or discontinuance of service on a spur track, as noted in the *Valley Feeds* and *Battaglia* decisions, it only applies to private track. A railroad's duty to serve such track is governed by 49 U.S.C. § 11103, and there is no corresponding duty to serve a railroad-owned spur.

For these reasons, UP believes there is no need for the Board to further clarify its views with respect to rail carriers' obligations to maintain spur tracks as part of their common carrier service obligations.

Sincerely,



Gabriel S. Meyer

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<sup>3</sup> *Cities of Auburn and Kent—Petition for Declaratory Order—BN RR Co.—Stampede Pass Line*, 2 S T B 330, 341 (1997).

<sup>4</sup> See, e.g., *Sierrapine—Lease and Operation Exemption—Sierra Pacific Industries*, STB Finance Docket No. 33679, STB served Nov. 27, 2001, at 3, n 6; *CSX Transp., Inc.—Abandonment Exemption—In Rocky Mount, Nash County, NC*, STB Docket No. AB-55 (Sub-No. 562X), STB served Dec. 29, 1999, at 1, n.2

<sup>5</sup> See *Pejepscot Industrial Park, Inc., d/b/a Grimm Industries—Petition for Declaratory Order*, STB Finance Docket No. 33989, STB served May 15, 2003, at 5-7.

<sup>6</sup> *Valley Feed Co v Greater Shenandoah Valley Development Co. d/b/a Shenandoah Valley RR Co.*, STB Finance Docket No. 41068, STB served Dec. 11, 1998. In finding that it lacked jurisdiction over the railroad-owned spur track that provided the sole connection to the shipper's private track, the Board stated, "[W]e affirm the ICC's finding that the common carrier obligation provisions do not apply to spur track." *Id.* at 16. See also, *Battaglia Distrib. Co., Inc v. BN RR Co.*, STB Docket No. 32058, STB served Dec. 11, 1998 (Board lacked authority to order restoration of rail service over "incidental side track")